Roy (Migration) [2021] AATA 4016 (19 October 2021)

1.

2.

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mr Swadesh Roy
CASE NUMBER:	1900731
HOME AFFAIRS REFERENCE(S):	BCC2018/3500421
MEMBER:	Namoi Dougall
DATE:	19 October 2021
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal affirms the decision not to grant the applicant a GK – Temporary Skill Shortage (Class GK) visa.

Statement made on 19 October 2021 at 11:31am

CATCHWORDS
MIGRATION – Temporary Skill Shortage (Class GK) visa – Subclass 482 (Temporary Skill Shortage) – bogus document and false or misleading information provided with visa application – reference for work in home country – departmental check showed applicant never worked for claimed employer – vague claim that application was organised by third party – complicity or reckless indifference – no circumstances justifying grant of visa – consent to decision without hearing – decision under review affirmed

LEGISLATION
Migration Act 1958 (Cth), ss 5(1), 65, 359(2), 359A
Migration Regulations 1994 (Cth), Schedule 2, cl 482.217, Schedule 4, criterion 4020(1)(a), (3), (4), (5)

CASES
Arora v MIBP [2016] FCAFC 35
Batra v MIAC [2013] FCA 274
Kaur v MIBP [2017] FCAFC 184
Plaintiff M64/2015 v MIBP [2015] HCA 50
Trivedi v MIBP [2014] FCAFC 42

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

3. This is an application for review of a decision made by a delegate of the Minister for Home Affairs on 20 December 2018 to refuse to grant the applicant a GK – Temporary Skill Shortage (Class GK) visa under s 65 of the *Migration Act 1958* (Cth) (the Act).

4. The applicant applied for the visa on 14 September 2018. The delegate refused to grant the visa on the basis that the applicant did not satisfy the requirements of cl 482.217 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations) because the delegate was not satisfied that the applicant met the requirements of public interest criterion (PIC) 4020 of Schedule 4 to the Regulations. The delegate found that the applicant had provided with his Subclass 482 visa application a bogus document, being a work reference from the Red Capsicum Restaurant, and that no information was given to indicate that the applicant was seeking a waiver to public interest criteria 4020.

5. On 13 July 2021, the Tribunal wrote to the applicant inviting them pursuant to s.359A of the Act to comment on adverse information which is discussed below and pursuant s.359(2) of the Act inviting the applicant to provide information relevant to the review.

6. On 26 July 2021, the applicant responded to the Tribunal's letter of 13 July 2021 with a submission.

7. On 2 September 2021, the Tribunal wrote to the applicant inviting them pursuant to s.359A of the Act to comment on adverse information which is discussed below and pursuant s.359(2) of the Act inviting the applicant to provide information relevant to the review, including a submission that there are compelling circumstances affecting the interests of Australia, or compelling or compassionate circumstances affecting the interest of an Australian citizen, Australian permanent residents, or an eligible New Zealand citizen that justify the grant of the Subclass 482 visa. The adverse information was the same as the Tribunal's letter of 26 July 2021 but the Tribunal provided a more clearer explanation as to why the information was relevant. The adverse information is set out below.

8. On 16 September 2021, the applicant responded to the Tribunal's letter of 2 September 2021 by providing the same submission as was provided on 26 July 2021.

9. On 6 September 2021, the applicant's representative advised in writing that his client is not willing to attend the hearing and happy to have the matter decided without hearing.

10. The applicant was represented in relation to the review by his registered migration agent.

11. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

12. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl 482.217 for the grant of the visa. Broadly speaking, this requires that:

- there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1); and

- the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2) and (2AA); and

- the applicant satisfies the Minister as to his or her identity: PIC 4020(2A); and

- neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2B) and (2BA).

13. The requirements in PIC 4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: PIC 4020(4). However, this waiver does not apply to the identity requirements in PIC 4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

Has the applicant given, or caused to be given a bogus document, or information that is false or misleading in material particular?

14. The term 'information that is false or misleading in a material particular' is defined in PIC 4020(5) and the term 'bogus document' is defined in s 5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in PIC 4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.

15. The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: PIC 4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.

16. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.

17. On 14 September 2018, the applicant lodged his Subclass 482 visa application in which he stated that he worked for the Red Capsicum Restaurant in Bangladesh on a part time basis from 4 February 2015 to 13 December 2016 in the capacity of Restaurant Manager.

18. Provided with the Subclass 482 visa application was a work reference purporting to have been issued by the Red Capsicum Restaurant (the Restaurant) and signed by Mr Motain as the Manager of the Restaurant (the work reference).

19. The work reference was referred to the Department of Home Affairs office overseas for verification of authenticity from the business owner of the Restaurant. The business confirmed that neither the applicant or Mr Motain were known to the business and that the applicant had never worked for the Restaurant.

20. On 21 November 2018, the Department sent the applicant a natural justice letter (the natural justice letter) in which it set out the above information and stated the Department believes the work reference was not issued by the 'Red Capsicum Restaurant' and is a fraudulent document. The applicant was asked to comment on the information that was suspected to be false and misleading in a material particular and the document which is suspected of being bogus.

21. The Department in the natural justice letter invited the applicant to comment on the above information, but the applicant did not respond to the Department. Nor did the applicant provide any specifics as to whether there were compelling circumstances affecting the interests of Australia, or compelling or compassionate circumstances affecting the interest of an Australian citizen, Australian permanent residents, or an eligible New Zealand citizen that justify the grant of the Subclass 482 visa. The applicant did not respond to the Department's natural justice letter.

22. As referred to above, the Tribunal wrote to the applicant on 2 September 2021 pursuant to s.359(A) of the Act. The particulars of the adverse information set out in the Tribunal's letter were as follows:

    - In your Subclass 482 visa application lodged on 14 September 2018 (the 482 application) you stated that you worked for the Red Capsicum Restaurant in Bangladesh on a part time basis from 4 February 2015 to 13 December 2016 in the capacity of Restaurant Manager.

    - As part of the Subclass 482 application you provided a work reference purporting to have been issued by the Red Capsicum Restaurant (the Restaurant) and signed by Mr Motain as the Manager of the Restaurant.

    - The work reference was referred to the Department of Home Affairs office overseas for verification of authenticity from the business owner of the Restaurant. The business confirmed that neither you or Mr Motain were known to the business and that you had never worked for the Restaurant.

23. The Tribunal then stated that it may find that the applicant did not meet the requirements of PIC 4020(1)(a) and if it does find this, and if the Tribunal is not satisfied that there are compelling circumstances affecting the interests of Australia, or compelling or compassionate circumstances affecting the interest of an Australian citizen, Australian permanent residents, or an eligible New Zealand citizen that justify the grant of the visa, the decision under review may be affirmed as the applicant does not meet relevant criteria for the grant of a Subclass 482 visa: reg. 482.217.

24. The Tribunal's letter also invited the applicant, pursuant to s 359(2), to provide a submission that there are compelling circumstances affecting the interests of Australia, or compelling or compassionate circumstances affecting the interest of an Australian

citizen, Australian permanent resident, or an eligible New Zealand citizen that justify the grant of the Subclass 482 visa.

25. The applicant provided a submission in response to the Tribunal's letter of 2 September 2021 in which he stated that the issue realised by the Tribunal was not in his knowledge as it was all organised by the 'people who offered him this opportunity'. He also stated that it started when he was offered an opportunity at the Red Capsicum Restaurant and he was totally unaware of the adverse effects and authenticity of the opportunity. He accepted their offer and lodged his application, but he does not know how they organised the reference or who is Mr Montain and that he was unaware of all the information processed with his application.

26. In relation to the applicant's claimed work history set out in his Subclass 482 visa application, the Department verified the authenticity of the work reference and the reference with the owner of the Red Capsicum Restaurant who confirmed that neither the applicant or Mr Motain were known to the business and that the applicant had never worked for the Restaurant. Therefore, the Tribunal is satisfied that purposively false and misleading information in relation to the applicant's work history was provided in the applicant's Subclass 482 visa application which was false and misleading at the time it was given. Further, the applicant's false and misleading information as to his work history is relevant to the assessment of the applicant's work experience under cl 482.212 which requires the applicant met, amongst other things, PIC 4020. That is, the false and misleading information is relevant to criteria the Minister may take into account when making a decision. Therefore, the Tribunal is satisfied that the applicant's claimed work history is false and misleading in a material particular.

27. The definition of 'bogus document' incudes documents "that purport to have been, but was not issued, in respect of the person", the work reference purported to have been issued in respect of the applicant by Red Capsicum Restaurant and purportedly signed by Mr Montain as Manger was not verified by the owner of the Red Capsicum Restaurant as being genuine. Instead the owner of the Restaurant confirmed that neither the applicant or Mr Motain were known to the business and that the applicant had never worked for the Restaurant. That is the Restaurant purporting to have issued the documentation has confirmed that it is a fake.

28. Therefore, on the above the Tribunal is satisfied that work reference purportedly issued by the Red Capsicum Restaurant is fake and has the necessary quality of purposeful falsity. Further, the Tribunal is also satisfied that the document is a bogus document.

29. The Tribunal will now address the applicant's claim that he was not responsible for providing to the Department false and misleading information or a bogus document.

30. If the applicant is complicit in the provision of false information or 'indifferent' to it (in the sense of being indifferent to an agent acting unlawfully or dishonestly), it can be said that the applicant caused it to be given.

31. The Department in the natural justice letter of 21 December 2018 set out that the basis on which the Department may find that the applicant did not meet PIC 4020 which was that he had provided false and misleading information as to his work history and that the work reference was bogus document. The applicant did not respond to the natural justice letter. The Department in the decision to refuse the Subclass 482 visa application on 20 December 2018 on the basis the applicant did not meet the requirements of PIC 4020 because he had provided false and misleading information

as to his work history and that the work reference was bogus document. The applicant has not made any claim that he did not receive the natural justice letter or the decision.

32. Further, the applicant did not cease his relationship with his migration agent at the time he could be taken to have received the natural justice letter or the Department's decision but continued to engage the migration agent to submit the application for review being considered by the Tribunal on 10 January 2019. Although on 22 May 2020, the applicant changed his migration agent. The applicant's claim that the 'unauthentic information' was all organised by the people who offered him the opportunity is vague and lacking in detail. Therefore, the Tribunal is not satisfied that there is fraud on the part of the applicant's former migration agent in providing the false and misleading information and the bogus document to Department as part of the applicant's Subclass 482 visa application.

33. The applicant's claim as to the identity of the people who organised the unauthentic information is unclear, and he may not be alleging fraud on the part of his former migration agent but on some other unidentified person or persons.

34. Even if there was fraud on the part of the former migration agent or another third party, the Tribunal is satisfied that the applicant was recklessly indifferent to that fraud. He had been made aware of the false and misleading information and bogus document in the Department's natural justice letter and its decision, but he continued to use the services of his former migration agent until more than a year after he lodged his application for review with this Tribunal.

35. For the reasons and findings made above, the Tribunal is satisfied that the applicant had given, or caused to have been given the false and misleading information as to his work history and bogus document being the reference to the Department as part of his Subclass 482 visa application.

36. The evidence before the Tribunal is that the applicant has given, or caused to have given, a bogus document and information that was false and misleading in a material particular in his Subclass 482 visa application. Therefore, the applicant does not meet PIC 4020(1).

Should the requirements of PIC 4020(1) or (2) be waived?

37. The requirements of PIC 4020(1) and (2) may be waived where there are compelling circumstances that affect the interests of Australia, or where there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen (as defined in reg 1.03), that justify the granting of the visa. The decision-maker must first be satisfied that there are such circumstances, then must consider whether to exercise the discretion to waive the requirements, having regard to those circumstances: *Kaur v MIBP* [2017] FCAFC 184.

38. The expressions 'compelling circumstances' and 'compassionate or compelling circumstances' are not defined for these purposes. To be compelling, the circumstances must force or drive the decision-maker irresistibly to be satisfied: see *Plaintiff M64/2015 v MIBP* [2015] HCA 50. The ordinary meaning of 'compassionate' relates to feelings of sympathy, sorrow, pity or concern for others.

39. The applicant did not provide to the Department or to the Tribunal any information or submissions in relation to compelling circumstances that affect the interests of Australia or any compassionate or compelling circumstances that affect the interests of

an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen (as defined in reg 1.03), that justify the granting of the visa. Therefore, the Tribunal is not satisfied that any such circumstances exist and, therefore, the Tribunal is not satisfied that the requirements should be waived.

40. On the basis of the above, the applicant does not satisfy PIC 4020 for the purposes of cl 482.217.

DECISION

41. The Tribunal affirms the decision not to grant the applicant a GK – Temporary Skill Shortage (Class GK) visa.

Namoi Dougall
Member

ATTACHMENT

Migration Regulations 1994

Schedule 4

4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:

(a) the application for the visa; or

(b) a visa that the applicant held in the period of 12 months before the application was made.

(2) The Minister is satisfied that during the period:

(a) starting 3 years before the application was made; and

(b) ending when the Minister makes a decision to grant or refuse to grant the visa;

the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).

(2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.

(2A) The applicant satisfies the Minister as to the applicant's identity.

(2B) The Minister is satisfied that during the period:

(a) starting 10 years before the application was made; and

(b) ending when the Minister makes a decision to grant or refuse to grant the visa;

neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).

(2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.

(3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.

(4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:

(a) compelling circumstances that affect the interests of Australia; or

(b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;

justify the granting of the visa.

(5) In this clause:

information that is ***false or misleading in a material particular*** means information that is:

(a) false or misleading at the time it is given; and

(b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

…

Migration Act 1958

s 5 Interpretation

(1) In this Act, unless contrary intention appears:

…

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

(a) purports to have been, but was not, issued in respect of the person; or
(b) is counterfeit or has been altered by a person who does not have authority to do so; or
(c) was obtained because of a false or misleading statement, whether or not made knowingly.

…